

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EMANUEL ELIJAH ELLIS-EL,

Defendant-Appellant.

UNPUBLISHED

October 28, 2004

No. 248614

Kent Circuit Court

LC No. 00-003816-FH

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Defendant Emanuel Elijah Ellis-El appeals as of right his conviction of breaking and entering a building with intent to commit a larceny,¹ entered after a jury trial. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

The owners of a restaurant discovered Elijah Ellis-El on the premises after they had informed his employer, a cleaning service, that he should no longer clean their establishment. Elijah Ellis-El's employer testified that Elijah Ellis-El had been informed that he was no longer to report for work at the restaurant. In response to a question whether Elijah Ellis-El continued to work at any other establishment, the employer stated that Elijah Ellis-El was terminated from an assignment at another business based on a report that he was consuming alcohol during working hours. Elijah Ellis-El testified that he reported to the restaurant because he had not been informed that he was no longer supposed to do so. The jury found Elijah Ellis-El guilty as charged and the trial court sentenced him as a second habitual offender to 1½ to 10 years in prison, with credit for twenty-eight days. Elijah Ellis-El's minimum term was within the applicable statutory sentencing guidelines.

II. Prosecutorial Misconduct

A. Standard Of Review

Elijah Ellis-El asserts that the prosecutor denied him a fair trial by improperly eliciting testimony from his former employer that he was terminated from an assignment due to a report

¹ MCL 750.110.

that he consumed alcohol during working hours. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.² We review a claim of prosecutorial misconduct de novo.³

B. Legal Standards

Generally, an unresponsive, volunteered answer that injects improper evidence into a trial does not deny the defendant the right to a fair trial unless the prosecutor knew in advance that the witness would give the unresponsive testimony, or conspired with or encouraged the witness to give the testimony.⁴

C. Applying The Standards

We first note that Elijah Ellis-El failed to object to the complained-of response; therefore, absent plain error, he is not entitled to relief.⁵ Further, the prosecutor's question whether Elijah Ellis-El continued to clean other restaurants was reasonable in light of the prosecution's theory that Elijah Ellis-El entered the restaurant after he had been terminated from that assignment and thus had no right to be on the premises. No evidence suggests that the prosecutor expected the witness to refer to Elijah Ellis-El's alleged consumption of alcohol during working hours, or that the prosecutor conspired with or encouraged the witness to give such a response.⁶ That portion of the answer was unresponsive, but was not pursued at the time or mentioned by the prosecutor during closing argument. Any prejudice resulting from the response could have been cured by a timely instruction.⁷ We conclude that Elijah Ellis-El has not demonstrated the existence of prosecutorial misconduct⁸ or plain error.⁹

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Richard A. Bandstra

² *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

³ *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

⁴ *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

⁵ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁶ *Griffin*, *supra*.

⁷ *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

⁸ *Watson*, *supra*.

⁹ *Carines*, *supra*.